Correspondence

Matters of Privacy: A Response to Kohn

Dear Editors:

Nearly a decade ago, I was hard at work on a study of informed consent to medical and surgical treatment when I received from an academic colleague a form entitled "Consent to Sexual Relations." Like any good surgical consent form, it described briefly the nature of the proposed procedure, its potential benefits, the risks and consequences, the available alternatives and, finally, the projected course of the relationship if the procedure were not undertaken. The form acknowledged in bold letters that it was clearly understood that there were no guarantees that the procedure would be successful. It concluded with a line for the intended sexual partner's signature.

Despite my discomfort with the form's sexist overtones and dismay that my friend was poking fun at the object of my research, I laughed aloud at the form. Surely, I thought, this facetious *reductio ad absurdum* would never become a reality; even if the "right to know" and the "right of individual self-determination" came to be fully acknowledged in medicine, they could never be implemented in the context of social intercourse. Or could they? Upon reading Roger Kohn's recent article, *Conflicting Rights of Privacy and the Duty of Disclosure between Sexual Partners*, published in the December issue, I began to wonder whether I had been wrong. Perhaps in the Orwellian world now upon us, one could take seriously the notion that matters as private as sexual relations will become a matter of routine legal inquiry. To some degree, in fact, Dr. Kohn's recitation of the case law reveals that they already have!

Let no one doubt that I believe that people are entitled to the information they need for personal decisionmaking on matters essential to their physical well-being. In health care, food and drugs, consumer products, workplace safety, environmental contamination and numerous other contexts, I support legal sanctions to reinforce what I regard as the moral imperative to provide information to persons placed at risk by another's actions. In a culture as tightly interdependent as ours, *caveat emptor* is not an acceptable rule for defining responsibilities in social interactions. Yet, one's responsibility for the welfare of others cannot be without limit. Thus arises the question, so familiar to the law: "Where should the line be drawn?"

In the context of Dr. Kohn's inquiry, I believe that practicality of enforcement should be an important determinant of where to draw the line. I find it difficult to envision courts opening their doors to "pre-sexual disclosure" cases where liability ultimately turns on what one party declared to the other as they were climbing into bed. Many issues of fact that courts encounter do come down, of course, to questions of one person's word against another's. But often there are corroborating witnesses or surrounding circumstances which, as a matter of rational inference, give the greater credibility to one party's version of the story. In the intensely private and personal context of sexual relations, I doubt this would often be the case.

Imagine a female defendant taking the stand to claim, "I warned him before we made love that I had herpes, but he said it didn't matter. He wanted me anyway." The male plaintiff then would counter, "Of course, she didn't tell me. How could anyone believe I would have had sex with someone at the risk of contracting such a disease?" Which of the two apparently earnest witnesses would the jury believe? In such a case, would there really be anything other than personal bias upon which a juror could base his or her choice? Unless the jury were constituted of equal numbers of each sex, Jimmy the Greek could give you clear odds on what the verdict would be. My point is, simply, that even if one could prove scientifically that the disease actually was contracted from the party being sued — a problem which Dr. Kohn recognizes in his reference to *Sindell v. Abbott Laboratories*[1] — the question of whether there was or was not pre-consensual disclosure cannot be satisfactorily resolved. Thus the outcome in such cases would turn, ironically, on the "passions" of the jury. The only workable alternative would be to make a signed "disclosure of risks" form the only allowable proof that a sexual partner had satisfied the duty of providing information. That, of course, leads us right back to my colleague's tongue-in-cheek consent form, one decade later.

I would prefer not to see a rule of law where outcomes are determined by a "coin toss" or by the jurors' bias. Perhaps a rule of strict liability would be more workable, and more consistent with the somewhat analogous food, drug and product liability cases. If the plaintiff could prove by scientific evidence that he or she had contracted a disease from a particular sexual partner, that partner would be held strictly liable in damages for the physical harm suffered. Such strict liability would amount to an irrebuttable presumption that no one would have sex with another if he or she knew the other to be a carrier of venereal disease. Such a presumption may not be consistent with the realities of how lovers react at the height of their passion, but the law contains ample precedent for irrebuttable presumptions that disregard reality in the pursuit of public policy and judicial efficiency.

Some would likely argue that even if a sexual partner were proven to be a carrier of disease, he or she should not suffer legal liability unless it could also be proven that he or she knew of the disease. In other words, *knowing* transmission of a disease would be actionable whereas transmission alone would not. The problems of proof posed by such a "scienter"[2] requirement would be almost as knotty as those mentioned above concerning the fact of disclosure. For instance, who would bear the burden of proving such knowledge? If a plaintiff could show that his or her sexual partner was a carrier, would the plaintiff also have to prove the partner was aware of this fact at the time of the sexual encounter(s)? That is, would there be a retroactive duty to warn? If so, how far back in time would the obligation extend? For "Mr. Goodbar" types, the record-keeping responsibilities could be substantial! Perhaps to ease the plaintiff's burden, awareness of one's own infection could be presumed, subject to the carrier's being given the opportunity to rebut the presumption. Would the physician-patient privilege be overridden to make the carrier's medical records discoverable and admissible on this point? These and many other evidentiary puzzles come to mind. Suf-

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fice to say, the ground of liability which Dr. Kohn's article suggests would not be an easy one to implement.

All these problems of proof in intimate affairs, and the larger issue of privacy, are recognized in the constitutional law cases cited by Dr. Kohn, including *Griswold v. Connecticut*,[3] and *Eisenstadt v. Baird*.[4] Invasion of the privacy of the marital bedroom, or the merely coital back-seat, is not resisted solely because of a punctilious societal respect for intimacy without intrusion. Legal intervention is equally repelled by the realization that it makes little practical sense to declare illegal that which cannot be proved in court.

Suppose that suits for unforewarned transmission of venereal infection are allowed. What will the courtrooms be like? The taking of testimony will be more lively than is the case in most of our drudging civil litigation. The ratings of afternoon soap operas may slip as crowds line up outside municipal buildings across the land to seek a look at the "real-life" dramas being played out. Or perhaps the networks, loath to miss out on such a good thing, will merge "The Young and the Restless" with "The People's Court" and come forth with a whole new form of truly riveting educational programming.

To many, I suspect, converting the courts into soap opera sets is not an appealing prospect. In fact, as Dr. Kohn points out, complainants would probably be reluctant to come forward and expose themselves to the public eye. One would certainly not expect many suits by herpes victims. On the other hand, the consequences, economic and otherwise, of AIDS, undesired pregnancy, and the transmission of genetic defects are sufficiently serious to motivate litigants in spite of the ignominy involved. So, given the (paraphrased) proverbial "infinite numbers of potential litigants and infinite numbers of courtrooms," I am sure that we will see more cases along the lines described and thoughtfully analyzed by Dr. Kohn. May heaven give us the wisdom to deal with them!

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References

1. 607 P.2d 924 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980). It is somewhat difficult to imagine a party suing for venereal infection where he or she would have to rely upon a "market share" approach to apportion liability.
2. "Scienter" is defined as "the defendant's previous knowledge of the cause which led to the injury complained of or rather his previous knowledge of a state of facts which it was his duty to guard against, and his omission to do which has led to the injury complained of. . . ." H.C. BLACK, BLACK'S LAW DICTIONARY (West Publishing Co., St. Paul, Minn.) (5th ed. 1979) at 1207.
3. 381 U.S. 479 (1965).
4. 405 U.S. 438 (1972).

Preventive Law: Is Money the Obstacle?

Dear Editors:

In his eloquent essay, *Reflections: Preventive Medicine and Preventive Law: An Essay that Belongs to My Heart*, published in the October issue, Louis M. Brown laments the fact that the legal system's adroitness at identifying and preventing personal injury, on both the primary and secondary levels, generally lags far behind the abilities of the health care system in this regard. He lays much of the blame for this deficiency on the too-frequent failure of legal education and practice to imbue legal practitioners with an adequate spirit of caring and humanism toward the clients whom they serve.

It is true that the caring felt and exhibited by many attorneys toward their clients leaves much to be desired. It seems to me, however, that Mr. Brown has failed to mention a much more serious and fundamental reason for the differing stages of development in preventive medicine and preventive law, namely, money, or, to be more precise, lack of money.

Each of the diagnostic and therapeutic medical interventions described by Mr. Brown, with the possible exception of his initial annual physical examination, was presumably financed by either public (i.e., Medicare — the author stated that he was seventy-three years old) or private (i.e., Blue Cross/Blue Shield or commercial) health insurance. Our society has created the means to fund (albeit inadequately) various aspects of preventive medicine. Thus, patients are more likely to seek out preventive health services, and physicians and other caregivers are more likely to offer preventive consultation and treatment.

Conversely, society has provided no effective funding mechanism yet for making preventive legal services — diagnostic and therapeutic — generally available to the public. The one exception is the dwindling Legal Services Corporation that even at its height served only a small and categorically select portion of our population. Today, middle or upper class individuals or families desiring or desperately needing such services must either pay for such services out of their own pocket or forego them. Most choose the latter alternative. In the legal as well as the medical realm, money is the tail that wags the dog: function follows financing. I am confident that were adequate private and/or public funding of preventive legal services generally available, more potential clients would gladly seek them out and more practicing attorneys (magically made more caring and human) would be more ready, willing, and able to provide them.

The concept of preventive law raises many interesting and enticing possibilities. One area in which such a development might bring about very salutary effects is that of advance health care planning, through the execution and invocation of documents like living wills and durable powers of attorney that could guide future medical decision-making for individuals who subsequently become mentally incompetent. However, until our society is willing to back its rhetoric with a financial commitment, and to devote a meaningful amount of its collective economic resources to the fulfillment of individual legal rights and opportunities (through the inception of third-party payer programs like Judicare, Judicaid, Blue Scales, and employer-paid enrollments in Legal Maintenance Organizations), the deficiencies that Mr. Brown perceptively pointed out in the quality of preventive law will probably persist.

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